IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10.12.2007

Coram:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

C.R.P.(NPD)No.447 of 2004
and
C.M.P.No.3819 of 2004

Parthiban .. Petitioner

vs.

1.Girija
2.Balasundaram Pillai
(2nd respondent is given up
as an un-necessary party) .. Respondents

PRAYER:Civil Revision Petition filed against the fair and final order dated 23.07.2003 made in I.A.No.317 of 2002 in O.S.No.73 of 1996 on the file of the Sub Court, Kallakurichi.

For Petitioner : Mr.T.Murugamanickam

For Respondent : Mr.P.Jagadeesan for R1
R2 given up

O R D E R

The Civil Revision Petitioner is the son of the deceased second defendant in O.S.No.73 of 1996 on the file of the Sub Court, Kallakurichi. The first respondent is the plaintiff in the said suit. The Civil Revision Petitioner/Applicant has filed I.A.No.317 of 2002 in O.S.No.73 of 1996 praying to condone the delay of 713 days in filing the application under Section 5 of the Limitation Act.

2.The Civil Revision Petitioner/deceased second defendant's son/Applicant in I.A.No.317of 2002 has averred that a decree was passed against the first defendant and the second defendant in a suit on pronote and that O.S.No.74 of 1992 was initially filed in the Sub Court, Virudhachalam and later, it was transferred to the District Court, Villipuram and re-numbered as O.S.No.288 of 1994 and from there, it was transferred to the Sub Court, Kallakurichi and numbered as O.S.No.73 of 1996 and taken on file. It is the case of the Civil Revision Petitioner/Applicant before the lower Court that the first defendant appeared before the Court and contested the case and a decree was passed on 20.08.1996 against the second defendant and that no notice of summons was sent to the second defendant either from the District Court,

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Villipuram or from the Sub Court, Kallakurichi and his father was not aware of the facts of the case and that the petitioner was not aware of the details of the case and that his father did not receive any letter from his advocate and that the Plaintiff's husband met him 4 days before and asked him to settle the decree and he came to know all the details of the decree only after his visit to the Court and that when the case was transferred from one Court to another, the Court has sent notice to the parties but no notices were sent either by the District Court, Villipuram or by the Sub Court, Kallakurichi and resultantly, his father did not know about the case and that his father expired on 16.09.1998 at Attur and that the Plaintiff and the first defendant colluded together and set the first defendant exparte and hence, the delay of 713 days in filing Order 9 Rule 13 application has to be condoned.

3.In the counter filed by the first respondent, it is stated that it is false to allege that the first respondent's husband asked about the discharge of the decree 4 days prior to the date of filing of the application and then only, the Applicant knew about the decree and that the decree passed in the present case on 20.08.1996 was not an exparte decree but a decree passed after contest and recording of evidence after full trial and therefore, Order 9 Rule 13 petition will not lie and that the petitioner can and should file only an appeal and in such circumstances, the Application under Order 9 Rule 13 C.P.C is not tenable, the application under Section 5 of the Limitation Act is also not maintainable.

4.It is the stand of the first respondent that the Civil Revision Petitioner's father who was the second defendant in the suit was duly served, had full knowledge of the proceedings and knew about the trial of the case and pronouncement of the judgment after fully trial and therefore, the application is not maintainable and the same is malafide and therefore, the application may be dismissed with costs.

5.In the present civil Revision Petition, the second respondent Balasundaram has been given up as an un-necessary party. But, he has filed an objection to the I.A.No.317 of 2002 filed by the Revision Petitioner/Applicant stating that when the Judgment was pronounced on 06.09.1996, the applicant's father was alive and he expired on 16.09.1998 and till his demise, he did not file any application to set aside the decree and that the applicant is not a party to the suit and that the applicant has no loco standi to file the present application and that the decree was passed after cross-examining the witnesses and therefore, it is not an exparte decree and that the applicant's father had three daughters and wife who were alive and who were not arrayed as parties and from the date of passing of the decree from 06.09.1996 to 29.09.2000 till the date of filing the Section 5 application, there is a delay of 1460 days and not 713 days as mentioned in the application and therefore, the application is to be dismissed.

6.The learned Sub Judge, Kallakurichi while dismissing the I.A.No.317 of 2002 in O.S.No.73 of 1996 on 23.07.2003 without costs has mentioned clearly that the trial Court passed a decree on 06.09.1996, which was not an exparte decree but a decree after full trial and that on the side of the Plaintiff, six documents were marked and one witness was examined and the witness was also cross-examined and only after hearing the arguments of respective sides, the judgment was pronounced and the applicant has to

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prefer an appeal against the said judgment and decree and therefore, the applicant cannot file Section 5 application for condonation of delay.

7.As a matter of fact, the learned Sub Judge, Kallakurichi while dismissing the I.A.No.317 of 2002 in O.S.No.73 of 1996 has further opined that the Civil Revision Petitioner/Applicant's father who was the second defendant in the suit expired on 16.09.1998 after passing of the Judgment and Decree on 06.09.1996 and that the applicant's father took up no steps to prefer an appeal and without filing the L.R. Application and impleading application, the Section 5 application filed by the applicant cannot be allowed since the L.R. Application has to be filed by all the legal heirs first and later on, only any application can be filed etc.,

8.It is pertinent to point out that from the date of passing of the decree in O.S.No.73 of 1996 from 06.09.1996 to 29.09.2000 (till the date of filing second application) there is a delay of 1460 days and not 713 days mentioned in the application.

9.It is pertinent to point out that in the notes paper of O.S.No.73 of 1996 on 08.04.1996, there is an endorsement by the learned Sub Judge that 'Mr.T.K.L and Mr.M.S. Files vakalat for the plaintiff. D2 already set exparte. Notice to D1 only by 12.06'. On 12.06.1996, D1 was served and Mr.A.S. Offered to file vakalat for D1 and for filing vakalat, time was granted by the learned Sub Judge by 09.07.1996 and on 09.07.1996, vakalat for D1 was not filed and therefore, D1 was called absent and set exparte and the matter was posted for evidence by 11.07.1996. On 11.07.1996, the matter was directed to be called on 23.07.1996 since there was Advocates Boycott. On 23.07.1996, when the matter was posted for evidence, a petition to set aside the exparte order was filed and allowed and trial was ordered by 06.08.1996 and on 06.08.1996, the counsels on either side were not ready and hence, the matter was adjourned to 20.08.1996 and on 20.08.1996, Exs.A1 to A6 were filed and no further evidence on the side of the Plaintiff was adduced and no further evidence on the side of the Plaintiff and there was no oral evidence on the defendant's side and the arguments were heard and the matter was posted for Judgment by 30.08.1996 and the Judgment was not pronounced on 30.08.1996 and the matter was suo moto reopened for arguments by 06.09.1996 and on 06.9.1996, the judgment was pronounced by the Court below in O.S.No.73 of 1996 dismissing the suit as against the first defendant without costs and the second defendant was directed to pay a sum of Rs.56,056/- and for the principal amount of Rs.28,000/-, interest at 12% per annum was ordered to be paid from the date of filing of the suit till the date of payment along with the suit costs.

10.The learned counsel for the Civil Revision Petitioner submits that originally the suit O.S.No.74 of 1992 filed at the Sub Court, Virudhachallam after bifurcation was sent to the District Court at Villupuram and it was re-numbered as O.S.No.288 of 1994 and on the point of jurisdiction, the matter went to the Sub Court, Kallakurichi and got numbered as O.S.No.73 of 1996 and the Revision Petitioner's father was not put on notice by the Transferee Court and that the non issuance of notice to the father of the Civil Revision Petitioner who was the second defendant in the suit has resulted in illegality in the present case.

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11.In this connection, it is useful to refer to the decision 1997 (1) M.L.J. 291, KRISHNAMMAL AND ANOTHER V. ARULMIGHU MADANAGOPALASWAMY TEMPLE REPRESENTED BY ITS EXECUTIVE OFFICER, PERAMBALUR, wherein it is observed as follows:

> "It is not the duty of the Transferee Court to inform the parties about the transfer when the parties are represented by counsel before the Transferor Court. In this case, there is no dispute that the parties were represented by respective counsels before the Transferor Court. Hence, there is absolutely no necessity for the issue of fresh summons to the defendants in the suit."

12.In (1992) 2 Law Weekly pg.505, K.JANARTHAN & ANOTHER V. R.THILAK KUMAR, wherein it is observed as follows:-

> "C.P.C., 0.9. R.13, and Ss.24 and 115, Limitation Act (1963), S.5 and Art. 123, Column 3, and General Clauses Act, S.27, Madras Civil Courts Act (Central Act 7 of 1892), and Practice - Application to set aside ex parte decree - Tendency of litigants to treat ex parte decrees casually and make at leisure application to set aside, condemned.
>
> Adverse inference, held, ought to have been drawn from non-examination of Advocate, to explain about the pleas and as to why and how they did not give information about transfer of proceedings from High Court original side to City Civil Court.
>
> Plea of failure to issue notice by transferee court vitiating the proceedings - Plea rejected.
>
> Presumption under S.27 of General Clauses Act - Scope - Requirement under Art.123 of Limitation Act to file application for setting aside ex parte decree within 30 days - 'Summons' and 'notice', use of the expressions to denote suit and application respectively - Starting point, is date of knowledge of decree.
>
> C.P.C., S.24- Transfer of suit from original side of High Court to City Civil Court under statutory effect - Notice by transferee court not necessary - Sec C.P.C., 0.9, R.13, etc.
>
> C.P.C., S.115 - Erroneous order of lower court setting aside ex parte decree - Interference in revision - Permissibility - Sec 0.9, R.13, etc.
>
> Limitation Act (1963), S.5 and Art.123, column 3 - Application to set aside ex parte decree - Sec C.P.C., 0.9, R.13 and Ss.24 and 115, etc.,
>
> Madras Civil Courts Act (Central Act 7 of 1892) - Sec C.P.C. 0.9, R.13, and Ss.24 and 115
>
> General Clauses Act, S.27 - Postal acknowledgement, filing of - Presumption - Scope - Sec C.P.C., 0.9, R.13 and Ss.24 ad 115. etc.
>
> Practice - Tendency of litigants to treat ex parte decrees casually, deprecated.

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Notice to parties by transferee court, not necessary when suit is transferred from original side of High Court to City Civil Court under statutory effect-Sec C.P.C., 0.9, R.13, Ss.24 and 115, etc.,"

13.In view of the above, this Court is of the view that when the litigants are represented before the Transferror Court, notice to the parties by the Transferee Court is not necessary and that the exparte decree would not be set aside merely because notice was given to the defendant by the Transferree Court about the transfer of the suit before it and therefore, the contention of the learned counsel for the Civil Revision Petitioner that notice ought to have been issued by the transferree Court is not accepted by this Court.

14.Generally, the Courts of law are to adopt a liberal approach while dealing with the section 5 Application for condonation of delay. Normally, a party does not stand to benefit by filing an application late. Refusing to condone the delay can result in good matter being thrown out at the early stage and cause of justice being defeated. As against this, the delay is condoned the highest that can happen is that cause would be decided on merits after hearing the parties. In condonation of delay matters, a pedantic approach should not be made. As a matter of fact, when the substantial justice and technical considerations are pitted against each other, a cause of substantial justice deserves to be preferred in the considered opinion of this Court. A party does not stand to benefit by resorting to delay. In fact, he runs a risk.

15.As far as the present case is concerned, it transpires from the records that the decree passed by the learned Sub Judge, Kallakurichi in O.S.NO.73 of 1996 on 06.9.1996 is not an exparte decree and that the said decree was passed after examining P.W.1 and marking Exs.A1 to A6 and no further evidence was adduced on the side of the plaintiff and that no oral evidence was adduced on the defendant side and the arguments were heard by the Court below and the judgment was delivered after full trial on 06.9.1996. In as much as the judgment delivered in O.S.No.73 of 1996 on 06.9.1996 by the Court below was not an exparte decree and since the judgment was delivered after full trial, this Court is of the considered opinion that the Civil Revision Petitioner if at all he is so aggrieved is entitled to prefer an appeal and question the same in the manner known to law and as such, I.A.No.317 of 2002 filed by him before the lower Court is not maintainable per se in the eye of law and moreover, the Civil Revision Petitioner has not explained the exact delay of 1460 days with sufficient cause and therefore, the dismissal of the said I.A.NO.317 of 2002 by the Court below does not warrant any interference in revision in the hands of this Court.

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16.From the above discussions, this Court comes to a conclusion that the Civil Revision Petition is liable to be dismissed and accordingly, the same is dismissed to promote the substantial cause of justice. The order passed by the learned Sub Judge, Kallakurichi in I.A.No.317 of 2002 in O.S.No.73 of 1996 dated 23.7.2003 is affirmed. However, the parties are directed to bear their own costs. The connected miscellaneous petition is closed.

vri

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge,
   Kallakurichi.

2. The Section Officer,
   V.R.Section, High Court, Madras.

+1 cc to Mr.P.Jagadeesan, Advocate Sr.No.73081.

BK(CO)
DCP/3.1

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